Supreme Court, U.S.
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No. 00-121

IN THE

Supreme Court of the United States

GEORGE DUNCAN,

Petitioner,

v.

SHERMAN WALKER,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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REPLY BRIEF OF PETITIONER

The sole issue in this case is whether a federal habeas corpus petition is an "application for State post-conviction or other collateral review" within the meaning of the tolling provision of AEDPA's statute of limitations, 28 U.S.C. § 2244(d)(2). Respondent's brief ("Resp. Br.") relies heavily on the arguments set forth by the Second Circuit below and by the Tenth Circuit in *Petrick v. Martin*, 263 F.3d 624 (10th Cir. 2001), both of which strained to read the applicable text and statutory purposes in light of "fairness" and "equity" concerns not presented by this case.

Neither the textual nor policy arguments of those courts or of respondent can withstand scrutiny. Interpreting the one-year statute of limitations as being tolled only during the pendency of state collateral proceedings is consistent with the text of the provision and the purposes of AEDPA, as well as with this Court's habeas corpus jurisprudence.

I. The Statutory Text Of The Tolling Provision Does Not Encompass Prior Federal Habeas Petitions

Respondent's textual argument in support of the Second Circuit's reading of section 2244(d)(2) rests almost entirely on the contention that the word "or" creates a complete disjunctive break "down the center" of the phrase "application for State post-conviction or other collateral review." Resp. Br. at 12. He thus strains to make the words on either side of the disjunctive "or" independent and symmetrical, arguing that "State post-conviction" and "other collateral" are the terms intended to be contrasted by the disjunctive "or". Resp. Br. at 13. Having arbitrarily eliminated "review" from the contrasting phrase in the interest

of forced symmetry, respondent notes that because "post-conviction" and "collateral" are used interchangeably by Congress and the courts, "the only method by which to supply independent meaning to the phrases occupying opposite sides of" the disjunctive "or" is by use of distinguishing adjectives, "State" and "other". Resp. Br. at 13. Thus, according to respondent, "other" must mean something distinct from "State". Resp. Br. at 13.

Respondent's contention is strained and misplaced. The phrase "State post-conviction or other collateral review" contains only one noun, and thus is the unitary prepositional object of the preceding phrase "a properly filed application for". It simply is incorrect that "or" creates a complete disjunction down the middle of the unitary prepositional object. In fact, the words on the two sides of "or" cannot (and do not) line up against one another. Respondent's suggestion that both sides of the disjunctive "or" are entirely independent of one another would require insertion of the noun "review" on each side of the word "or" – *i.e.*, "State post-conviction [review]" or "other collateral review" – and thus would create a compound, rather than unitary, prepositional object. This, however, is not what Congress did.

Contrary to respondent's assertion, the phrase "State post-conviction or other collateral review" must be read as a whole, and as it is written – without the noun "review" appearing at a second place. Accordingly, under the more natural reading, the terms contrasted and given distinct meaning by the disjunctive "or" are not "State" and "other", but rather "post-conviction" and "other collateral", such that the word "State" stands outside of the disjunctive phrase, modifying the only noun "review".

This reading is supported by the fact that "State" and "other" are not cognate or congruent terms which naturally lend themselves to contrast or juxtaposition. Indeed, if respondent's reading is correct, then there is no reason why "State" and "other" have any place or meaning whatsoever in the provision.

By contrast, under petitioner's interpretation of the tolling provision, both "State" and "other" are meaningful. "State" specifies the kind of review proceedings which trigger the toll, and "other" makes clear that "collateral review" is a catch-all that refers to proceedings apart from those falling within the category of "post-conviction" review proceedings. *See* Brief of Petitioner ("Pet. Br.") at 20-23; *see also* Amicus Brief of Criminal Justice Legal Foundation ("CJLF Br.") at 9-10. To so casually read out the significance of a word such as "State", as respondent would have this Court do, *see* Resp. Br. at 12 ("The precise role played by the word 'State' is less clear."), is entirely unsupported as a matter of statutory construction. *See* Pet. Br. at 20.

If "State" means "State" and "other" means "federal" (or "State and federal"), then Congress used a rather oblique method to signify this in an area of the law where reference to sovereign entities is otherwise specified with great clarity. *See* Pet. Br. at 29-32; *see also Lindh v. Murphy*, 521 U.S. 320, 331-32 (1997) (rejecting ambiguous, indirect reading of AEDPA in favor of straightforward interpretation on grounds that Congress is not "so delphic"). In any event, Congress certainly did not set forth such a meaning with the level of clarity found in other parts of the habeas statute, where it clearly stated "Federal or State" proceedings (or "State or Federal" proceedings) when it so intended. *See* Pet. Br. at 27-29 (citing 28 U.S.C. §§ 2254(i), 2261(e) & 2264(a)(3)).

The tolling provision applicable to AEDPA's statute of limitations in capital cases, 28 U.S.C. § 2263(b), underscores the State's reading of section 2244(d)(2). Section 2263(b)(2) provides for tolling of the statute of limitations applicable in capital cases during the period beginning with the filing of a petition "for post-conviction review or other collateral relief . . . until final State court disposition of such petition." *Id.* Congress's phraseology in section 2263(b)(2) confirms that "other collateral relief" has meaning apart from "post-conviction review", and that limited tolling triggered only by State court proceedings falls within the policy of AEDPA. *See also* CJLF Br. at 7-8, 10-11 (noting that AEDPA's statute of limitations applicable to petitions by non-capital *federal* prisoners includes no tolling provision at all); *id.* at 12-14 (comparing legislative history of terminology of section 2244(d)(2) and section 2263(b)(2)). Respondent does not adequately explain why a different interpretation should lie, either as a matter of statutory construction or policy, with respect to non-capital cases involving state prisoners.

Recognizing the spurious nature of the Second Circuit's construction of the statutory text of the tolling provision, *see* Resp. Br. at 16 ("Even if this Court finds that the canons of statutory construction do not support the Second Circuit Court of Appeals' ruling. . . ."), respondent instead seeks to support the holding below by invoking a bizarre reading of AEDPA's statute of limitations as a whole. Respondent contends (Resp. Br. at 16-19) that AEDPA's statute of limitations requires only that a habeas petitioner file *any* federal habeas petition within the one-year limitations period. Regardless whether that timely federal petition is ultimately dismissed, according to respondent, all subsequent federal habeas petitions by that petitioner would also be timely because he had filed an earlier, now-dismissed federal petition within the one-year limitations period.

This contention flies in the face of the statute. Section 2244(d) provides that the one-year limitations period applies "to an application for a writ of habeas corpus", not to an *applicant* for habeas relief. The particular federal habeas application at issue, therefore, must be filed within the one-year limitations period. It does not suffice that the same petitioner timely filed a *previous*, dismissed application for habeas relief from the judgment, even if that dismissal was without prejudice.

It is established law that an initial habeas petition, dismissed without prejudice, is treated "as though it had not been filed." *Slack v. McDaniel*, 529 U.S. 473, 487-88 (2000). Indeed, under "the Rules of Civil Procedure applicable as a general matter to habeas cases," *id.* at 489, it has long been settled that a dismissal without prejudice leaves the situation as if the dismissed petition never had been brought. *See Hull v. Kyler*, 190 F.3d 88, 103 (3d Cir. 1999); *Bomer v. Ribicoff*, 304 F.2d 427, 428 (6th Cir. 1962); *see also* 9 Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. § 2373 at 398 & n.8, § 2367 at 321 n.8 (1995).

For that reason, the filing of an initial petition, ultimately dismissed, has no effect on an applicable statute of limitations. *See Elmore v. Henderson*, 227 F.3d 1009, 1011 (7th Cir. 2000) (Posner, C.J.) (collecting cases); *see also Semtek Int'l Inc. v. Lockheed Martin Corp.*, __ U.S. __, 69 U.S.L.W. 4147, 2001 U.S. LEXIS 1951, at *16-17 (Feb. 27, 2001) ("Black's Law Dictionary (7th ed. 1999) defines . . . 'dismissal without prejudice' as '[a] dismissal that does not bar the plaintiff from refiling the lawsuit within the applicable limitations period.' "). This is especially true in Walker's case, where the habeas application at issue raised claims entirely different from his previously dismissed federal habeas petition.

II. Petitioner's Reading Of The Tolling Provision Furthers The Purposes Underlying AEDPA And This Court's Habeas Corpus Jurisprudence

The State's reading of the tolling provision is consistent with the statutory purposes underlying AEDPA and the statute of limitations, as well as this Court's habeas corpus jurisprudence. Congress designed AEDPA to "reduce the abuse of habeas corpus that results from delayed and repetitive filings." CJLF Br. at 15 (internal quotations omitted). By establishing a one-year period of limitations, section 2244(d) effectuates this intent of reducing delay. The statute of limitations concomitantly promotes AEDPA's purpose of fostering comity for state court proceedings by encouraging the timely filing of a single federal habeas petition that contains only constitutional claims upon which the state courts already have passed. *See* Pet. Br. at 32-36.

The State's reading of the tolling provision is entirely consistent with the rationale underlying *Rose v. Lundy*, 455 U.S. 509 (1982). In *Rose*, this Court provided "a simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court." 455 U.S. at 520; *see also Duckworth v. Serrano*, 454 U.S. 1, 5 (1981) (per curiam) (rejecting an exception to the exhaustion requirement even for "clear violations" of constitutional rights, because it "would invite habeas petitioners to make a practice of first seeking relief on those grounds in federal court").

AEDPA furthers this policy by not permitting a petitioner to avail himself of statutory tolling when he does not first exhaust his claims in state court before filing an application for federal habeas relief. In other words,

"[t]he Congressional policy is clear. Exhaust state remedies first, then and only then go to federal court. The policy is advanced by denying tolling for a prior, dismissed federal petition." CJLF Br. at 19.

In an effort to evade this clear dictate, respondent argues that it is unfair "to place the onus on the prisoner to make sure that his petition contains only exhausted claims," because whether a claim genuinely is exhausted frequently presents a difficult question that is debatable among "knowledgeable attorneys and experienced judges." Resp. Br. at 22. Although the exhaustion status of a claim sometimes is unclear, AEDPA simply requires a petitioner to err on the side of caution by presenting such a claim to the state courts first to ensure that state courts have a full opportunity to rule on the issue in question. *See Rose*, 455 U.S. at 518-19 ("A rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error.").

AEDPA discourages petitioners from running to federal court unless and until they have resolved, through resort to the state courts, the doubtful exhaustion status of any particular claim. This regime not only promotes comity and respect for state court judgments, but it benefits the petitioner, because all the while that he is pursuing state court remedies, the statute of limitations for the filing of a federal habeas application is tolled. *See* 28 U.S.C. § 2244(d)(2).

Indeed, "the path to this straightforward approach was cleared by this Court's generous interpretation" of section 2244(d)(2) earlier this Term in *Artuz v. Bennett*, 121 S. Ct. 361 (2000). CJLF Br. at 16. In *Bennett*, the Court held that

the filing of an application for "post-conviction or other collateral review" in state court that contains claims that may be procedurally barred under state law does not render the application itself "improperly filed" within the meaning of section 2244(d)(2). 121 S. Ct. at 363-65. *Bennett* thus encourages petitioners with claims of questionable exhaustion status to bring them in state court first rather than risk running to federal court only to learn later that such claims are unexhausted and therefore ripe for dismissal, in accordance with *Rose*'s command to dismiss petitions containing both exhausted and unexhausted claims. *See Rose*, 455 U.S. at 522.

Stated differently, the application of section 2244(d)(2) does not, as respondent asserts, " 'unreasonably impair the prisoner's right to relief.' " Resp. Br. at 23, 26 (quoting *Rose*, 455 U.S. at 522). Excluding early "mixed" federal petitions from the tolling provided by section 2244(d)(2) only steers prisoners away from federal court and toward state court until such time as the petitioner can include all of his claims, now exhausted, in one single habeas petition that the federal court may consider on the merits. That policy is entirely consistent with and in furtherance of AEDPA, *Rose*, and this Court's habeas jurisprudence.

III. "Fairness" and "Equity" Concerns In Hypothetical Cases Do Not Justify Departure From Plain Construction of the Statute

Respondent nevertheless urges this Court to look beyond the statutory text and to construe the tolling provision expansively in light of the harsh results a contrary reading could potentially inflict in some hypothetical cases on unwary habeas petitioners. Resp. Br. at 23. He contends that

if the limitations clock continues to run during the pendency of a timely-filed federal habeas petition that later is dismissed on exhaustion grounds, the statute of limitations will be in the hands of "overworked judges with no mandate to process petitions uniformly or expeditiously" (Resp. Br. at 21) and that the limitations period may prevent some meritorious claims from ever being heard on federal habeas review because of technical procedural errors by *pro se* petitioners (Resp. Br. at 23).

Respondent's contention is misplaced. There is no basis at this juncture to presume that, were the Court to announce a clear holding in this case that the one-year limitations period continues to run during the pendency of federal habeas proceedings, prospective habeas petitioners or their counsel would not be able to conform their litigation strategy so as to file timely federal habeas petitions in a manner that allows for meritorious claims to be heard on the merits. "Just as *pro se* petitioners have managed to use the federal habeas machinery" and have learned "to master th[e] straightforward exhaustion requirement" set down in *Rose*, 455 U.S. at 520, so, too, should they be able to grasp the import and the potentially dire consequences (in light of AEDPA's statute of limitations) of filing a habeas petition that contains unexhausted claims, and thus is subject to dismissal following the passage of at least some time.

In fact, many of the alleged problems forecasted by respondent may well not come to fruition following this Court's articulation of its holding in this case, and any consequent adjustment of federal district court judges and habeas petitioners and counsel. Judges will have clear guidance to review federal habeas petitions expeditiously to

determine threshold issues of exhaustion and dismissal,[1] and habeas petitioners (and their counsel) will have added incentive to err on the side of exhaustion of their claims in state court proceedings to ensure federal habeas review on the merits and to invoke the statutory toll for the pendency of state proceedings. It simply is premature for the Court at this time to anticipate the practical consequences of a clear holding, or to presume dire consequences, and thereby base any interpretation of the statute upon such presumed hypothetical scenarios.

Indeed, the facts of this case do not provide a basis to consider the concerns raised by respondent. Walker's initial federal habeas petition was dismissed (without prejudice) promptly by the district court – within three months from the date of filing. Furthermore, the petition was dismissed not because it was a mixed petition containing unexhausted claims for which he necessarily would have had to return to state court, but rather due to a pleading deficiency: the petition did not adequately set forth which claims had been exhausted.

Although Walker had approximately ten months to correct the pleading deficiency and file a new federal petition, or else to return to state court to exhaust any unexhausted claims and thereby invoke the statutory toll, Walker instead

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1. The habeas statute requires district courts to consider applications for writs "forthwith" and sets short time limits on the process (*i.e.*, a return within three days, unless additional time is allowed, not to exceed twenty days; hearing set not more than five days after return unless additional time allowed for good cause; court to "summarily" hear and determine the facts). *See* 28 U.S.C. § 2243; *see also Lonchar v. Thomas*, 517 U.S. 314, 328 (1996) (discussing habeas Rule 4, which mandates that district court judges address petitions "promptly").

waited nearly eleven months before taking *any* further action. At that point, one month *after* the one-year period had run, Walker filed the habeas petition at issue before this Court, which contained entirely different claims from those presented in his initial federal application. Because those new claims had been raised on initial appeal of the state court conviction, there was no apparent reason why these claims could not have been timely presented within the one-year grace period for federal habeas review.

Under these circumstances, any "harshness" of result arising out of Walker's forfeiture of federal habeas review on the merits is attributable to his own lack of diligence. *See Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1990) ("The equities do not weigh in favor of modifying statutory requirements when the procedural default is caused by petitioners' 'failure to take the minimal step necessary' to preserve their claims.") (citation omitted); *Coleman v. Johnson*, 184 F.3d 398, 403 (5th Cir. 1999) (dismissal sustained because "Coleman does not explain the six-month delay between being notified about his state application and filing his federal petition"), *cert. denied*, 529 U.S. 1057 (2000); *United States v. Barrett*, 178 F.3d 34, 53 (1st Cir. 1999) ("where a prisoner had an opportunity to present his claim properly in his first § 2255 petition, but failed to do so, any 'ineffectiveness' of his current § 2255 petition is due to him"), *cert. denied*, 528 U.S. 1176 (2000).

The State recognizes, nevertheless, that it is possible in future cases that there may be timely-filed "mixed" federal habeas petitions containing potentially meritorious claims, but which could be subject to *Rose* dismissal after the one-year limitations period had expired during their pendency. In such cases, the narrow scope of the tolling provision

proposed by the State in this case could result in final denial of substantive federal habeas review of the potentially meritorious claims, notwithstanding their timely presentation (albeit in a "mixed" petition).

Statutes of limitation (like procedural default rules and exhaustion requirements), however, by their very nature impose a bar to the interposition of claims that may have merit, some of which may be barred for reasons outside of the claimant's control. In *Rose*, a plurality of the Court expressly recognized the possibility that in certain instances, no federal court might, for technical procedural reasons, ever reach the merits of certain habeas claims that a petitioner sought to bring in federal court. *See Rose*, 455 U.S. at 520 (noting that petitioner "would risk forfeiting [future] consideration of his unexhausted claims in federal court" if he failed to include them in his initial petition).[2]

In an effort fundamentally to reshape the landscape of federal habeas corpus law, AEDPA raised the bar to merits review of federal habeas petitions one notch higher. To the extent that AEDPA's statute of limitations, coupled with its failure to toll the limitations period for federal habeas applications, operates to bar certain petitioners from ever obtaining substantive habeas review, that is the policy

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2. *Cf. McNeil v. United States*, 508 U.S. 106, 113 (1993) (strictly applying the exhaustion requirement of Federal Tort Claims even against a pro se inmate, noting that "we have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel" and that "in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law") (quotation omitted).

determination Congress has made. *See Artuz v. Bennett*, 121 S. Ct. at 365 ("[I]t is not the province of this Court to rewrite the [AEDPA] statute. . . . We hold as we do because respondent's view seems to us the only permissible interpretation of the text – which may, for all we know, have slighted policy concerns on one or the other side of the issue as part of the legislative compromise that enabled the law to be enacted.").

Accordingly, the concerns raised by respondent as to hypothetical cases involving potentially meritorious claims do not justify departure from the proper *construction* dictated by the plain meaning of the language and statutory structure. *See United States v. Locke*, 471 U.S. 84, 93 (1985) ("with respect to filing deadlines a literal reading of Congress' words is generally the only proper reading of those words"); *cf. Miller v. French*, 530 U.S. 327, 338 (2000) ("the canon of constitutional doubt permits us to avoid [constitutional] questions only where the saving construction is not 'plainly contrary to the intent of Congress' ") (citation omitted).

Whether federal district courts have any discretion to depart from strict *application* of AEDPA's statute of limitations (properly construed) in such cases, and the scope or legal basis of any such discretion, is a distinct issue not before the Court in this case. The only issue before the Court here is how the statute of limitations should properly be interpreted, not whether there will be individual cases in the future where district courts may let equitable considerations guide their application of the statute of limitations.

Determination of the latter issue concerning equitable application of the limitations period in hypothetical cases will require percolation among the lower federal courts, in

the context of numerous factual and procedural scenarios, and in the light of practical experience with the consequences of the Court's holding in this case. *Cf. Herrera v. Collins*, 506 U.S. 390, 421 (1993) (O'Connor, J., concurring) ("Resolving the issue is neither necessary nor advisable in this case. The question is a sensitive and, to say the least, troubling one. It implicates not just the life of a single individual, but also the State's powerful and legitimate interest in punishing the guilty, and the nature of state-federal relations."); *see also* Resp. Br. at 27-28 & n.19 (noting that adoption of procedural rules and notice provisions by lower federal courts could help "safeguard[] the rights of unwary petitioners" and help protect them from "unwittingly sacrificing their first and only opportunity for federal habeas review").[3]

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3. As respondent notes (Resp. Br. at 18-19, 27), the federal habeas statute permits federal district courts to reach out and provide substantive federal habeas review of mixed petitions for purposes of denying such petitions on the merits. *See* 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."). The vast majority of habeas petitions do not present meritorious claims and are ultimately denied on the merits. *See* Victor E. Flango, National Center for State Courts, State Justice Institute, Habeas Corpus in State and Federal Courts at 62-63 (1994) (study of petitions filed in 1990 and 1992 finding a success rate of only 1%); see also Richard H. Fallon et al., Hart and Wechsler's The Federal Courts and The Federal System 1363-1364 (1996) (discussing filing and success rates for habeas petitions since 1950). Thus, section 2254(b)(2) enables federal district courts to reach the merits of timely-filed mixed petitions that are held beyond the one-year limitations period, in circumstances in which their dismissal would forever bar a petitioner from receiving substantive federal habeas corpus review.

It is sufficient for the present case that the petitioner's situation does not favor any departure from a strict application of the statute of limitations. *Cf. Wainwright v. Sykes*, 433 U.S. 72, 91 (1977) ("Whatever precise content may be given those terms [i.e., "cause" and "prejudice"] by later cases, we feel confident in holding without further elaboration that they do not exist here."). In view of Walker's clear lack of diligence and the absence of extraordinary circumstances, this is not a case in which the Court should reach beyond the facts of this case and address the hypothetical issue raised by respondent. *See Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984) ("One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence."); *see also United States v. Gonzalez*, 520 U.S. 1, 11 (1997) (noting that this Court is "hesitant to reach beyond the facts of this case to decide a question that is not squarely presented for our review").

CONCLUSION

The decision of the United States Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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